SR KATHERINE LIM KH

v.

KETUA PENGARAH PERKHIDMATAN PERUBATAN MALAYSIA, KEMENTERIAN KESIHATAN MALAYSIA & ORS.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-01-1-97]
14 APRIL 1997

LIMITATION: *Public Authorities Protection Act 1948 - Action against public authority - Section 2(a) - Whether applicable - Whether s. 29 of Limitation Act 1953 applicable instead*

PUBLIC AUTHORITIES: *Limitation - Action against public authority - Whether filed out of time - Public Authorities Protection Act 1948, s. 2(a)*

CIVIL PROCEDURE: *Time - Action against public authority - Whether filed out of time - Public Authorities Protection Act 1948 s. 2(a) - Whether a plaintiff must have exhausted all other remedies before coming to Court - Whether a plaintiff can take action to exhaust all other remedies and simultaneously file an action within time frame of s. 2(a)*

The appellant had filed an originating summons in the Court below praying for, *inter alia*: (i) a declaration that her dismissal by the respondents was *ultra vires* the general orders and in breach of natural justice and, therefore, null and void, and that she is still an employee of the respondent; and (ii) an order that she be re-instated to her former position. At the hearing, the respondents raised two preliminary objections, *viz*, that the appellant's action: (i) was time-barred by reason of s. 2(a) of the Public Authorities Protection Act 1948 ('the PAPA'); and (ii) should have been commenced by writ instead of by originating summons as the facts were in dispute. The appellant refuted the applicability of s. 2(a) of the PAPA and submitted that s. 29 of the Limitation Act 1953 was applicable instead. The High Court decided in favour of the respondents and the appellant appealed to the instant Court.

Held:
Per Abdul Malek Ahmad JCA

[1] Section 2(a) of the PAPA was applicable as the instant dispute involved a public authority. Time, therefore, had started to run from the date of the publication of the respondent's notice in the Government Gazette on

7 July 1988, and any suit or action by the appellant against the respondents must have been filed before 6 July 1991. The appellant's originating summons was filed on 7 November 1996; therefore, she was clearly out of time by five years and four months.

[2] It is not a pre-condition under any written law that the appellant must have exhausted all other avenues of administrative remedies before coming to Court. The appellant could have taken action to exhaust the other remedies available to her and, simultaneously, filed the instant action within the time frame prescribed by s. 2(a) of the PAPA.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PENGHADAN: *Akta Perlindungan Pihak Berkuasa Awam 1948 - Tindakan terhadap pihak berkuasa awam - Samada s. 29 Akta Penghadan 1953 sebaliknya terpakai*

PIHAK BERKUASA AWAM: *Penghadan - Tindakan terhadap pihak berkuasa awam - Samada telah difailkan di luar masa - Akta Perlindungan Pihak Berkuasa Awam 1948, s. 2(a)*

PROSEDUR SIVIL: *Masa - Tindakan terhadap pihak berkuasa awam - Samada telah difailkan di luar masa - Akta Perlindungan Pihak Berkuasa Awam 1948, s. 2(a) - Samada plaintif mestilah telah kehabisan semua remedi-remedi lain sebelum datang ke Mahkamah - Samada plaintif boleh mengambil tindakan bagi menghabiskan kesemua remedi-remedi lain dan secara serentak memfailkan satu tindakan dalam tempoh masa s. 2(a)*

Perayu telah memfailkan satu saman pemula dalam Mahkamah di bawah memohon, antara lainnya: (i) satu pengisytiharan bahawa pemecatan beliau oleh responden adalah *ultra vires* di sisi perintah-perintah am dan bertentangan dengan keadilan semulajadi dan, dengan itu, adalah batal dan tak sah, dan beliau masih merupakan kakitangan responden; dan (ii) satu perintah bahawa beliau hendaklah ditempatkan semula ke jawatannya yang dahulu. Di perbicaraan, responden telah membangkitkan dua bantahan awal, iaitu, bahawa tindakan perayu: (i) adalah dihalang oleh masa disebabkan oleh s. 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('PAPA'); dan (ii) seharusnya dimulakan melalui writ dan tidak melalui saman pemula kerana fakta-fakta telah dipertikaikan. Perayu telah menyangkal keterpakaian s. 2(a) PAPA dan berhujah bahawa s. 29 Akta Penghadan 1953 adalah sebaliknya terpakai. Mahkamah Tinggi telah memberi keputusan yang memihak kepada responden dan perayu telah merayu kepada Mahkamah semasa.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Seksyen 2(a) PAPA adalah terpakai kerana pertikaian semasa melibatkan pihak berkuasa awam. Masa, dengan itu, telah mula beredar daripada tarikh penerbitan notis responden dalam warta kerajaan pada 7 Julai 1988, dan sebarang guaman atau tindakan oleh perayu terhadap responden mestilah difailkan sebelum 6 Julai 1991. Saman pemula perayu telah difailkan pada 7 November 1996; dengan itu, beliau jelas telah kelewatan setelah berlalu tempoh masa selama lima tahun dan empat bulan.

[2] Ianya tidak merupakan satu prasyarat di bawah mana-mana undang-undang bertulis bahawa perayu mestilah telah kehabisan kesemua remedi-remedi pentadbiran yang lain sebelum datang ke Mahkamah. Perayu boleh mengambil tindakan bagi menghabiskan remedi-remedi lain yang ada baginya dan, secara serentak, memfailkan tindakan semasa dalam tempoh masa yang ditetapkan oleh s. 2(a) PAPA

[Rayuan ditolak.]

Legislation referred to:
Limitation Act 1953, s. 29
Public Authorities Protection Act 1948, s. 2(a)

Other source referred to:
Alternative Dispute Resolution: A Glance at the Law of Malaysia and India, Professor Dr. P.S. Sangal, [1996] 3 MLJ xxix

For the appellant - In person
For the respondents - Azmi Talib; Federal Counsel

JUDGMENT

Abdul Malek Ahmad JCA:

This appeal has been argued impressively by the appellant, who was the plaintiff in the Court below. However, after considering her oral and written submissions, we could not, despite our admiration for the way she handled the matter without the services of Counsel, agree with her on the preliminary point of limitation.

The prayers in her originating summons dated 7 November 1996 were as follows:

(a) for a declaration that the decision of the defendants purporting to dismiss the plaintiff from her post was *ultra vires* the general orders, in breach of natural justice, and therefore the decision was null and void, inoperative

and of no consequence, and that the plaintiff is still an employee of the Ministry of Health, Malaysia;

(b) for a declaration that the erroneous decision of the defendants, purporting that there was a disciplinary action to prevent permission for post-graduate study leave was defamatory, unjustified and in breach of natural justice; and therefore null and void, inoperative, and of no consequence; and that the plaintiff be granted post-graduate study leave with salary;

(c) for an order that the plaintiff be reinstated to her former position without any loss in seniority and remuneration;

(d) for an order that an account be taken of all salaries, emoluments and other benefits due to her from the date of her purported dismissal and the same to be paid to her;

(e) for an order that costs of this action be paid by the defendants to the plaintiff; and

(f) such further and other reliefs that this honourable Court deems just and expedient.

At the hearing before the learned High Court Judge, the respondents had raised two preliminary objections. Firstly, the action is time barred in view of s. 2(a) of the Public Authorities Protection Act 1948 (hereinafter 'the PAPA') and secondly, the matter should have been commenced by writ instead of by originating summons since the facts are in dispute.

It may be necessary to reproduce s. 2(a) of the PAPA at this juncture:

> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the excution of any such written law, duty or authority the following provisions shall have effect -
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

Before us, the appellant started off her submissions by stating that s. 29 of the Limitation Act 1953 (hereinafter 'the LA') applied in this case and not s. 2(a) of the PAPA. The said section reads:

29. Postponement of limitation period in case of fraud or mistake.

Where, in the case of any action for which a period of limitation is prescribed by this Act, either -

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which -

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

She maintained that she was away in Australia from March 1988 until 1991 doing her Master's degree and was not at all aware of the letter sent by the Ministry of Health to the Secretary of the Public Services Commission on 13 May 1988.

In that letter, the writer referred to a meeting of the disciplinary board for group B of the Hospital Sultanah Aminah, Johor Bahru on 20 April 1988 which had recommended that the appellant be dismissed from service for failing to report for duty without leave or for reasonable cause from 9 March 1988 to the date of the letter. Consequently, the Department had sent a registered letter dated 19 March 1988 and posted on 21 March 1988 to the appellant's last known address without getting any response. The letter added that it was believed that the appellant had left the country but her whereabouts overseas was not known.

The appellant further argued that all actions taken were defamatory to her professional growth as the relevant principal matron had made two major mistakes in giving fraudulent information by saying that disciplinary action had been taken against the appellant for two reasons.

One was that the appellant had been absent from work when she was doing her bachelor's degree in Singapore in 1984. The appellant insisted that she had in fact applied for study leave for that degree and referred to some of the correspondence from 1983 to 1986 exhibited in her affidavits. However, on our closer examination, these letters show that she had in fact applied for study leave but there is actually no letter of approval. The other was that she had been accused of sending a letter from the Johore State Government to the Federal Government.

Stressing on the limitation point, she reiterated that she had to exhaust all other remedies before coming to Court and referred to the article titled "*Alternative Dispute Resolution: A Glance at the Law of Malaysia and India*" by Professor Dr. P.S. Sangal appearing in [1996] 3 MLJ at p. xxix which held the view that the alternative modes of dispute resolution was arbitration followed by conciliation or mediation. Time should start, she argued, only when conciliation fails.

The appellant concluded that she had received a State scholarship and had good reason to be away for the relevant period and it was the respondent's fault for not granting her the permission. Since then, she had suffered humiliation as when she subsequently applied for a job in Assunta Hospital, she was not successful. Finally, she asked us to decide the matter without having to refer the matter back to the High Court.

The short reply of the learned Federal Counsel for the respondents was that s. 2(a) of the PAPA was applicable and limitation runs from the date of the Government Gazette on 7 July 1988. He had also referred to the letter from the Public Services Department to the Minister of Health dated 22 February 1988 which clearly stated that the appellant was not entitled to study leave on full pay as there was no such provision for officers not in group A. The letter clarified that the Department could consider approving study leave without pay for the appellant but since disciplinary action was being taken against her, this was also out of the question.

Despite the contention of the learned Federal Counsel in the High Court, we found that the facts are actually not in dispute. The appellant who was a nursing sister at the Sultanah Aminah Hospital in Johor Bahru applied for but was not successful in getting study leave with full pay to do a postgraduate course in Australia in 1988. In spite of that, she left for her studies on 9 March 1988. On 7 July 1988, the respondent had published a notice in the Government Gazette asking the appellant to report for duty within seven days as she had left her duties without leave or without any other reasonable cause failing which she would be deemed to have been dismissed from service with effect from the date of her absence. Of course, we now know the appellant never came back until 1991.

We are of the considered view that since this matter involves a public authority, s. 2(a) of the PAPA applies and time, therefore, must run from the date of the gazette publication namely 7 July 1988 meaning that any suit or action by the appellant against the respondents must be filed before 6 July 1991. Having filed the originating summons only on 7 November 1996, she is clearly out of time by five years and four months. On this preliminary point alone, her claim fails.

The second issue is whether she needs to exhaust all other administrative remedies before coming to Court. This is not a precondition under any written law and she could have taken both actions namely to exhaust the other remedies and to file the Court action simultaneously to meet the deadline provided under s. 2(a) of the PAPA.

There is, therefore, no necessity for us to dwell on the merits. We are in full agreement with the findings of the learned trial Judge. On the limitation point alone, we have to dismiss her appeal with costs and order that the deposit is to go the respondents to the account of their taxed costs.

Reported by Gan Peng Chiang